UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/028,153	12/20/2001	Paul T. Watson	BELL-0164/01331	3380

39072 7590 03/16/2006

MYERS BIGEL SIBLEY & SAJOVEC, P.A.
P.O. BOX 37428
RALEIGH, NC 27627

EXAMINER	
BELIVEAU, SCOTT E	

ART UNIT	PAPER NUMBER
2614	

DATE MAILED: 03/16/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/028,153	Applicant(s) WATSON ET AL.	
	Examiner Scott Beliveau	Art Unit 2614	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 06 March 2006 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
   b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: _____.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Attached.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. ☐ Other: _____.

Scott Beliveau
Examiner
Art Unit: 2614

DETAILED ACTION

Response to Arguments

1. Applicant's arguments filed 06 March 2006 have been fully considered but they are not persuasive.

With respect to applicant's arguments such that the combined Ellis ('526) patent and Ellis ('790) publication fail to particular teach or suggest the particular pertaining to "selecting one of the broadcast network or the broadband network for transmission of the video program . . . the selection based at least in part on an option of delivering the video program content either at a time that the request is received or at a future time", the examiner respectfully disagrees. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). In response to applicant's arguments filled on October 25, 2006 and in particular those set forth in pages 13-14, which are incorporated into the applicant's instant response, the examiner relied upon the Ellis ('526) patent with respect to the particular existence of a system coupled in parallel through both of a broadcast network and a broadband network to a viewer location wherein the broadcast network and the broadband network are different. As set forth in the rejection and particularly illustrated in Figures 1 and 12, the particularly claimed system architecture is illustrated. The Ellis ('790) publication and the particularly cited portions in the applicant's response set forth the usage of a program start-time for the timing of transmission of a requested program such that the program may be distributed either immediately or full/partial downloading during off-peak hours such that the program is

available for viewing at the requested time. This information is disclosed as being distributed over communications paths [32] which appear to be a number of different paths and/or channels (Page 13, Line 25 – Page 4; Page 14, Lines 20-26). Taken in combination, the references provide a system wherein an ordered or requested video program may be distributed either immediately or fully/partially during off-peak hours using any one of a plurality of transmission networks, including both broadcast and broadband networks.

In light of the combination, the argument that the combination does not select one of the multiple networks based on option of delivery time is not persuasive. If the system, as aforementioned, distributes the video program to the user at a particular time based upon a request, a selection or choice between one of the aforementioned broadcast or broadband networks must be made in order to deliver the program to the subscriber. The selection is based upon when the video is determined to be delivered in accordance with the subscribers delivery criteria. For example, one of the networks is selected to send the data off-peak if the program is not requested immediately. If the system were not to select one of the networks (ex. subscriber has overdue bills), then the requested program would not be delivered in accordance with the user designated delivery option.

With respect to applicant's arguments that it would not have been obvious to combine the Ellis with Rai et al. the examiner respectfully disagrees. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See In re Fine, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir.

1988)and In re Jones, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the Rai et al. reference is directed towards an analogous field pertaining to content transmission and the particular determination as to which network to distribute the content. The teachings of Rai et al. are not limiting with respect to the particular composition of the communication network such that it precludes or excludes any particular type of links. Rather, the reference sets forth that in general the communications network will comprise a variety of different types of node, equipment, and different types of link equipment made by different manufactures and having differing performance specifications. As an example, it is contemplated that links may include terrestrial/satellite communication links, Internet links or broadband links (Col 5, Lines 44-61). As set forth and argued by applicant, the Ellis ('526) reference contemplates the particular usage of a wide variety of links as well (including some of the same physical types mentioned by Rai et al.) and is analogous to applicant's invention in that it also provides a system and method for content transmission. Rai teaches when dealing with multiple link/network systems that it is desirable to provide a method to schedule services across networks in order to schedule high-quality delivery of services (Col 1, Lines 34 – Col 2, Line 6) which would appear applicable/relevant to the available multiple distribution paths of the combined Ellis references. Accordingly, applicant's arguments regarding the particular combination of the Ellis references and Rai et al. not being combinable is not considered persuasive.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Scott Beliveau whose telephone number is 571-272-7343. The examiner can normally be reached on Monday-Friday from 8:30 a.m. - 6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John W. Miller can be reached on 571-272-7353. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Scott Beliveau
Examiner
Art Unit 2614

SEB
March 10, 2006